Supreme Court, U.S.
FILED
FEB 7 2003
OFFICE OF THE CLERK

No. 02-876

IN THE

Supreme Court of the United States

TERESA BALLARD, KENISHA BRYANT
and CHERYL KING,

Petitioners,

v.

PHYLLIS GARRETT and ADVANCE AMERICA,
CASH ADVANCE CENTERS OF ARKANSAS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

BRIEF IN OPPOSITION FOR RESPONDENT ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC.

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Advance America, Cash Advance Centers of Arkansas, Inc., is wholly owned by Advance America, Cash Advance Centers, Inc.

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Advance America, Cash Advance Centers of Arkansas, Inc. ("Advance America") submits this Opposition to the Petition for Writ of Certiorari filed by Petitioners Teresa Ballard, Kenisha Bryant and Cheryl King (the "Petition"). Petitioners ask this Court to review the judgment of the Arkansas Supreme Court dismissing their appeal from a trial court order approving a class action settlement to which they objected. For the following reasons, the Petition should be denied.

STATEMENT OF FACTS

The underlying class action was filed on October 12, 1999. After eighteen months of contentious litigation, and two interlocutory appeals to the Arkansas Supreme Court, the parties were able to negotiate a proposed settlement. On April 9, 2001, the trial court certified a conditional settlement class. On May 2, 2001, the trial court preliminarily approved the proposed class action settlement and the form of notice to be sent to potential class members notifying them of the settlement. Court approved notice of the proposed settlement was mailed to over 19,000 potential class members. The notice informed potential class members that a fairness hearing would be held on July 18, 2001, and that they were given until June 30, 2001, to opt out of the class, or be bound by the settlement if approved by the trial court.

On July 6, 2001, Petitioners filed a motion seeking to intervene in this case for the purpose of objecting to the proposed settlement. On July 16, 2001, the trial court held a hearing on Petitioners' motion to intervene. After hearing argument from counsel, the trial court denied Petitioners' motion finding it to be untimely and concluding that the class members' interests were adequately represented by class counsel.

On July 18, 2001, the trial court held the final settlement hearing, at which Petitioners appeared through their counsel, offered evidence and were permitted to argue their objections to the proposed settlement. The trial court approved the settlement over Petitioners' objections, and entered a Final Judgment and Order of Dismissal on July 18, 2001. (App. B).

Petitioners then appealed the trial court's denial of their motion to intervene to the Supreme Court of Arkansas. The Arkansas Supreme Court affirmed the trial court's order denying Petitioners' motion to intervene finding that: (1) Petitioners waited until the litigation had progressed too far before they filed their motion to intervene; (2) granting Petitioners' motion to intervene would have caused the other parties to the litigation to suffer prejudice; and (3) Petitioners failed to provide a valid reason for their delay in filing their motion to intervene. *See Ballard v. Garrett*, 78 S.W.3d 73, 77, 349 Ark. 371, 379 (2002).

Petitioners then filed a second appeal challenging the trial court's final order approving the settlement agreement.[1] The Supreme Court of Arkansas found that Petitioners lacked standing to bring this appeal because they failed to timely intervene in accordance with Rule 24(a) of the Arkansas Rules of Civil Procedure. (App. A). In reaching its decision, the Arkansas Supreme Court stated that this Court's decision in *Devlin v. Scardelletti, et al.*, 536 U.S. 1, 122 S. Ct. 2005 (2002) involves facts and issues that are distinguishable from those presented in Petitioners' appeal and therefore *Devlin* was not controlling. (App. A). Rather, *Haberman v. Lisle*,

1. In total, Petitioners have filed three separate appeals with the Supreme Court of Arkansas and two Petitions for Writ of Certiorari in this Court.

884 S.W.2d 262, 318 Ark. 177 (1994) continues to be the controlling precedent with respect to state class action in Arkansas courts. (App. A).[2]

On July 23, 2002, Petitioners asked the Arkansas Supreme Court to reconsider its dismissal of their appeal of the trial court's order approving the settlement agreement. (App. F). The Petition for Rehearing was denied on September 5, 2002. (App. C). Petitioners filed their Petition for Writ of Certiorari with this Court on December 4, 2002.[3]

REASONS FOR DENYING THE PETITION

The Petition should be denied for several reasons. First, the judgment of the Arkansas Supreme Court does not conflict with this Court's holding in *Devlin v. Scardelletti*. In *Devlin*, this Court held that unnamed class members, who have timely objected to approval of a federal class action settlement, may appeal the settlement approval without first intervening. *See Devlin*, 122 S. Ct. at 2013. However, *Devlin* does not hold, as Petitioners argue, that timely objectors to state class action settlements are "parties" or may stand in the shoes of "parties" for all purposes and on all issues. Additionally, as the Supreme Court of Arkansas recognized, *Devlin* involves facts and issues that are distinguishable from those presented in this Petition. (App. A).

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2. Prior to June 12, 2002, Petitioners conceded that *Haberman* is the applicable and controlling law in Arkansas. (App. A).

3. This is the second Petition for Writ of Certiorari filed by Petitioners *in this action*. The first Petition was denied by this Court on January 13, 2003 (Docket No. 02-246). In addition, Petitioners filed a Petition for Writ of Certiorari in a similar, but unrelated action, challenging the fairness of that settlement agreement. That Petition was also denied by this Court on January 13, 2003. (Docket No. 02-542).

Second, the Appellate Rules of the Arkansas Supreme Court do not deny equal protection or due process to Petitioners and similarly situated litigants. What Petitioners attempt to portray as a denial of due process and equal protection is in reality nothing more than a consequence of poor litigation strategy by them. By attempting to intervene at the last minute, rather than opting out of a settlement to which they objected, Petitioners willingly undertook the risk that their motion to intervene might be denied for failure to satisfy the requirements of Rule 24(a) of the Arkansas Rules of Civil Procedure, and that they would be bound by the terms of the settlement as approved by the trial court. It is Petitioners' strategic election to intervene rather than opt out of the settlement, as well as their failure to satisfy Rule 24(a) of the Arkansas Rules of Civil Procedure, that resulted in dismissal of their appeal.

I.

THE DECISION OF THE ARKANSAS SUPREME COURT DOES NOT CONFLICT WITH THIS COURT'S OPINION IN *DEVLIN*

There is no conflict between the decision of the Arkansas Supreme Court denying Petitioners' appeal of the settlement and this Court's decision in *Devlin*. In *Devlin*, the Court was faced with the question of whether an objector, who did not have the ability to opt out of a federal class action settlement, must first intervene in order to appeal the district court's approval of the settlement over his timely objections. The Court held that unnamed class members, who have timely objected to approval of a federal class action settlement, may appeal the settlement approval without first intervening. *See Devlin*, 122 S. Ct. at 2013. However, *Devlin* does not

hold, as Petitioners argue, that timely objectors to state class action settlements are "parties" or may stand in the shoes of "parties" for all purposes and on all issues.

As the Arkansas Supreme Court correctly recognized, *Devlin* involves facts and issues that are distinguishable from those presented in this Petition. Unlike *Devlin* which addresses a question of law and procedure arising under the Federal Rules of Civil Procedure, this case (and this Petition) involve a question of law and procedure arising under the Arkansas Rules of Civil Procedure. Thus, the Petition before this Court raises questions of Arkansas state law and procedure in Arkansas state courts.

Another distinguishing factor is that a significant concern for the majority in *Devlin* was the right of unnamed class members, who had timely objected to a settlement, to protect their own interests in a settlement by which they would be bound. *See Devlin*, 122 S. Ct. at 2011. This was a particular concern in *Devlin* because the federal class action had been certified under Rule 23(b)(1) of the Federal Rules of Civil Procedure, so the objecting class member did not have the ability to opt out of the settlement. *See id.* Because he was not able to opt out of the class, appealing the approval of the settlement was the only means by which the objector could protect himself from being bound by a settlement to which he objected. *See id.*

Unlike the objecting class member in *Devlin*, Petitioners here had the ability to opt out of the settlement and avoid being bound by it. Indeed, the Petitioners were ideally positioned to opt out of the settlement because they already had their own action pending against Advance America for the same relief as sought by the class representative in this

litigation.[4] By attempting to intervene at the last minute, rather than opt out of a settlement to which they objected, Petitioners willingly undertook the risk that their motion to intervene might be denied for failure to meet the requirements of Rule 24(a) of the Arkansas Rules of Civil Procedure. Petitioners' strategic election not to opt out of the settlement, plus their failure to meet the requirements of Arkansas Rule of Civil Procedure 24(a), further distinguishes this matter from *Devlin*.

II.

PETITIONERS HAVE MISREPRESENTED THE LAW

Petitioners assert that this Court held on June 17, 2002 that the presence of an opt out provision was "a distinction without a difference". Petition at 9. In apparent support of their statement Petitioners cite to *Henderson v. Gen. Am. Life Ins. Co.*, 122 S. Ct. 2584 (2002). However, *Henderson* does not stand for the proposition advanced by Petitioners. Rather, the *Henderson* opinion cited by Petitioners simply remanded the case to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Devlin*. *See id.*

4. At the time they moved to intervene, the Petitioners were named plaintiffs in another putative class action against Advance America. *See Ballard, et al. v. AA Check Cashiers, et al.*, No. CIV-00-5100 (W.D. Ark. 2000). That case was dismissed by the district court in November 2000 for failure to state a claim and for lack of subject matter jurisdiction. Petitioners were appealing that dismissal to the U.S. Court of Appeals for the Eighth Circuit at the time they sought to intervene in this matter. The Eighth Circuit Court of Appeals later affirmed the dismissal by the district court. *See Ballard, et al. v. AA Check Cashiers, et al.*, 19 Fed. Appx. 468, 2001 WL 1117558 (8th Cir. 2001).

Moreover, Petitioners' neglect to mention that upon reconsideration, the Eighth Circuit indicated that it believed limiting the application of *Devlin* to cases of mandatory class actions "has considerable merit." *See In re Gen. Am. Life Ins. Co. Sale Practices Litigation*, 302 F.3d 799, 800 (2002)[5]. Therefore, Petitioners' contention that this Court held in *Henderson* that the presence of an opt out provision was a distinction without a difference is unsupported and untrue.

III.

NO DUE PROCESS OR EQUAL PROTECTION CONCERNS ARE RAISED IN THIS APPEAL

There are no due process or equal protection concerns raised in this appeal. Rather, what Petitioners attempt to characterize as a denial of due process or equal protection is in reality a thinly-veiled attempt to camouflage poor litigation strategy by Petitioners and their counsel.

Petitioners claim they have been denied due process and equal protection because the Arkansas rules of procedure and appellate standing are being applied to subject them to obligations in its judicial system, while denying them access to the appellate courts. *See* Petition at 15. However, it is Petitioners' failure to satisfy the requirements of the rules, not the rules themselves, which resulted in the dismissal of their appeal. Petitioners' failure to satisfy the requirements of Rule 24(a) of the Arkansas Rules of Civil Procedure prevented them from having standing to appeal the order of the trial court. (App. A). Rather than acknowledge their

5. The Eighth Circuit was not required to determine the impact of *Devlin* in *Henderson* because Henderson's case became moot in the months since the court's first decision. *See id.* at 800.

failure to comply with the rules, Petitioners' instead blame the rules and attempt to manufacture due process and equal protection concerns.

Clearly, Petitioners' failure to satisfy Rule 24(a), the same rule all similarly situated litigants are required to satisfy, does not constitute a violation of due process or equal protection. Under Petitioners' logic, their failure to timely appeal an order of a district court within the thirty-day period required by Rule 4 of the Federal Rules of Appellate Procedure would also give rise to due process and equal protection violations. It is Petitioners' failure to comply with the rules, not the rules themselves, that has prevented Petitioners from having standing.

Moreover, in raising due process and equal protection concerns, Petitioners fail to acknowledge that they were ideally situated to opt out of the settlement because they already had an action pending against Advance America in federal court for the same relief sought by the class representative in this action. (App. A). Petitioners could have opted out of the settlement in this action and continued pursuing their own action against Advance America.

Instead, Petitioners elected to abandon their own claims against Advance America and attempt to intervene in this action at the last minute. By doing so, Petitioners willingly undertook the risk that their motion to intervene might be denied for failure to satisfy Rule 24(a) of the Arkansas Rules of Civil Procedure, and they would be then bound by the settlement as approved by the trial court. Having lost the gamble, Petitioners should not be heard now to say their unsuccessful attempt to intervene is "good enough" to confer standing upon them to appeal the settlement.

CONCLUSION

For all of the foregoing reasons, Advance America respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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